

Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 35 *Voting Rights Symposium* | *New Jersey's Environmental Cleanup Recovery Act (ECRA)*
Symposium

January 1989

Successor Liability Under ECRA

Horton J. Lance

Follow this and additional works at: https://openscholarship.wustl.edu/law_urbanlaw



Part of the [Law Commons](#)

Recommended Citation

Horton J. Lance, *Successor Liability Under ECRA*, 35 WASH. U. J. URB. & CONTEMP. L. 263 (1989)

Available at: https://openscholarship.wustl.edu/law_urbanlaw/vol35/iss1/15

This ECRA Symposium is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Urban Law Annual ; Journal of Urban and Contemporary Law by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

SUCCESSOR LIABILITY UNDER ECRA

The New Jersey legislature enacted ECRA to clarify the extent of liability for successor landowners of hazardous waste sites.¹ To a great extent ECRA accomplishes this purpose by requiring the transferor to clean up the site before the transfer, thus negating the possibility of successor liability. Nevertheless, specific provisions of ECRA fail to govern some predecessor-successor liability disputes. Thus, in some instances successor landowners of innocently acquired property may be liable for cleanup costs under ECRA. This result conflicts with the intent of the legislature in its enactment of ECRA² and is potentially unconstitutional as an inequitable oppression of landowners.³

ECRA clarifies the issue of successor liability. Under its provisions,

1. Note, *The Environmental Cleanup Responsibility Act (ECRA): New Accountability For Industrial Landowners in New Jersey*, 8 SETON HALL LEGIS. J. 331, 332 (1985) (ECRA was enacted to avoid predecessor-successor disputes that delayed cleanup [hereinafter Note, *New Accountability*]). Note, *Successor Landowner Liability for Environmental Torts: Robbing Peter to Pay Paul?*, 13 RUTGERS L.J. 329, 349 (1982) (ECRA seeks to "prospectively avoid the successor landowner liability issue").

New Jersey's attempt to clarify the limits of successor landowner liability is both a commendable and noteworthy legislative goal. In this era of increasing ecological awareness and societal demands for environmental responsibility, other states are following New Jersey's lead by enacting statutes similar to ECRA. See CONN. GEN. STAT. ANN. § 22a-134aa-134o (West 1985) (Connecticut state statute governing transfer of hazardous waste establishments). See also Gov. Cuomo *To Propose Legislation to Require Cleanups When Property Is Sold*, 1 Toxics L. Rep. (BNA), Jan. 21, 1987, at 902.

2. See Note, *New Accountability*, *supra* note 1, at 339. (New Jersey legislature apparently ignored the issue of predecessor liability).

The issue turns on whether ECRA is a "site-specific" or "activity-specific" regulatory law. See Note, *New Jersey's Environmental Cleanup Responsibility Act: An Innovative Approach to Environmental Regulation*, 90 DICK. L. REV. 159, 191 (1985) [hereinafter Note, *An Innovative Approach*] (ECRA as written appears to be an activity-specific law).

3. The New Jersey legislature enacted ECRA pursuant to New Jersey's state police power. The constitutional limits of the police power include the requirement that the means of regulation be reasonable and necessary for the public interest "and not unduly

the original contaminators must bear cleanup costs.⁴ By requiring cleanup by predecessor landowners, New Jersey may completely avoid the issue of successor liability. In the alternative, ECRA allows transferees to accept responsibility for cleanup.⁵ In such cases, the question of successor liability is easily decided. This section of the symposium addresses those instances where successor liability is an unsettled issue.

Problems arise when a transfer of land falls outside of specific ECRA provisions. For example, suppose landowner A sells property to B before ECRA's passage. B is not aware that the property contains stored toxic waste. After ECRA's enactment, transferor A becomes bankrupt or insolvent. Transferee B prepares to sell to C; however, ECRA requires either a negative declaration⁶ or a cleanup plan before

oppressive." *Lawton v. Steele*, 152 U.S. 133, 137 (1894). ECRA may be unconstitutionally oppressive if NJDEP forces nonculpable property owners to pay cleanup costs.

See also *New Jersey ECRA Law Is Flawed, Should Not Be Used As Model*, Attorney Says, 1 Toxics L. Rep. (BNA), Nov. 12, 1986, at 654. (ECRA is vague and overbroad and NJDEP has administered ECRA in an overly inclusive manner).

4. ECRA states that "[t]he cleanup plan and detoxification of the site shall be implemented by the owner or operator, provided that the purchaser, transferee, mortgagee or other party to the transfer may assume that responsibility pursuant to the provisions of this act. N.J. STAT. ANN. § 13:1K-9(3)(c) (West Supp. 1988). The "owner or operator" of each "industrial establishment" is responsible for cleanup. An "industrial establishment" is any place engaged in the generation or storage of hazardous waste. N.J. STAT. ANN. § 13:1K-8(f) (West Supp. 1988).

5. *Transfer of industrial establishment: contingent on implementation of act: deferral of cleanup plan*

a. The provisions of any law or regulation to the contrary notwithstanding the transferring of an industrial establishment is contingent on the implementation of the provisions of this act.

b. If the premises of the industrial establishment would be subject to substantially the same use by the purchaser, transferee, mortgagee or other party to the transfer, the implementation of a cleanup plan and the detoxification of the site may be deferred until the use changes or until the purchaser, transferee, mortgagee or other party to the transfer closes, terminates or transfers operations.

(1) Within 60 days of receiving notice of the sale or realty transfer and the certification that the industrial establishment would be subject to substantially the same use, the department shall approve, conditionally approve, or deny the certification.

(2) Upon approval of the certification, the implementation of a cleanup plan and detoxification of the site shall be deferred.

N.J. STAT. ANN. § 13:1K-11 (West Supp. 1988).

6. N.J. ADMIN. CODE tit. 7, § 26B-1.3 (1987) defines a "negative declaration" as: affidavit approved by the Department which is executed by an authorized officer or management official of the industrial establishment stating that there has been no discharge of hazardous substances and wastes on or from the industrial establishment, or that any such discharge on or from the industrial establishment has been cleaned up in accordance with procedures approved by the Department, and that

every transfer.⁷ Preparing for its negative declaration, B discovers the waste, which at any time may begin to leak and pose a health hazard. Must B pay for cleanup of A's toxic waste?

Prior to enactment of ECRA, the answer would certainly have been no. *State of New Jersey v. Exxon*⁸ and *State Department of Environ-*

there remain no hazardous substances and wastes at the industrial establishment except those that, upon written Department approval, will remain as part of the normal industrial or commercial operation pursuant to any written agreements, lease arrangements, or other contracts as part of the change in ownership or operation.

Id.

ECRA provides:

Owner or operator of industrial establishment planning to close or sell or transfer operations; duties; implementation of cleanup plan

a. the owner or operator of an industrial establishment planning to close operations shall:

(1) Notify the department in writing, no more than five days subsequent to public release, of its decision to close operations;

(2) Upon closing operations, or 60 days subsequent to public release of its decision to close or transfer operations, whichever is later, the owner or operator shall submit a negative declaration or a copy of a cleanup plan to the department for approval and a surety bond or other financial security for approval by the department guaranteeing performance of the cleanup in an amount equal to the cost estimate for the cleanup plan.

b. The owner or operator of an industrial establishment planning to sell or transfer operations shall:

(1) Notify the department in writing within five days of the execution of an agreement of sale or any option to purchase;

(2) Submit within 60 days to transfer of title a negative declaration to the department for approval, or within 60 days prior to transfer of title, attach a copy of any cleanup plan to the contract or agreement or sale or any option to purchase which may be entered into with respect to the transfer of operations. In the event that any sale or transfer agreements or options have been executed prior to the submission of the plan to the department, the cleanup plan shall be transmitted, by certified mail, prior to the transfer of operations, to all parties to any transaction concerning the transfer of operations, including purchasers, bankruptcy trustees, mortgagees, sureties, and financiers;

(3) Obtain, upon approval of the cleanup plan by the department, a surety bond or other financial security approved by the department guaranteeing performance of the cleanup plan in an amount equal to the cost estimate for the cleanup plan.

c. The cleanup plan and detoxification of the site shall be implemented by the owner or operator, provided that the purchaser, transferee, mortgagee or other party to the transfer, may assume that responsibility pursuant to the provisions of this act.

N.J. STAT. ANN. § 13:1K-9 (West Supp. 1987).

7. For a description of the general requirements of a cleanup plan, see N.J. STAT. ANN. § 13:1K-8(a) (West Supp. 1988).

8. 151 N.J. Super. 464, 376 A.2d 1339 (Ch. Div. 1977). Under a statutory predeces-

*mental Protection v. Ventron*⁹ established the principle that successor landowners were not liable for cleanup unless they contributed to or condoned the presence of toxic waste.¹⁰ After ECRA's enactment, B's status should remain the same. Section 13:1K-16 of ECRA provides that successor landowner B will not be liable if B promptly reports newly discovered toxic waste.¹¹

sor to New Jersey's Spill Compensation and Control Act, the New Jersey Department of Environmental Protection (NJDEP) sued ICI America, Inc., seeking to hold ICI liable for oil refinery pollution on its land. The previous landowner was responsible for the pollution. The court held that simple ownership of land was insufficient to impose liability in the absence of affirmative acts by the successor. The court indicated that Exxon, the original owner and a third party to the suit, was the party that should be liable. *Id.* at 464, 376 A.2d at 1243. The court dismissed NJDEP's complaint against ICI America, Inc.

9. 94 N.J. 473, 463 A.2d 893 (1983). In *Ventron*, NJDEP brought an action under the state's Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11a to -23.11z (West Supp. 1988). The Supreme Court of New Jersey found the corporate defendants liable for cleanup of mercury pollution in Berry's Creek, an estuary of the Hackensack River. 94 N.J. at 483, 463 A.2d at 898. Defendants Robert and Rita Wolf were innocent purchasers of part of the property from Ventron Corporation. The Wolfs were not responsible for the presence of the mercury and therefore the court held the Wolfs were not liable. *Id.* at 493, 463 A.2d at 903.

10. *Exxon*, 151 N.J. Super. at 471, 376 A.2d at 1344 (liability is not imposed when defendant did not contribute to waste on the property and did not encourage or permit the accumulation of waste); *Ventron*, 94 N.J. at 493, 463 A.2d at 908 (construing the Spill Act, defendants are liable if they are "in any way responsible" for toxic waste).

11. *Industrial establishment; owners' or operators' inspections and reporting requirement; violations; penalty; injunctions; liability of reporter*

a. An owner or operator of an industrial establishment, or real property which once was the site of an industrial establishment, who knows or suspects the occurrence of any hazardous discharge on-site, above or below ground, at the industrial establishment or real property shall, within 10 days of obtaining any information leading to this knowledge or suspicion, make an inspection thereof and file a written report concerning this hazardous discharge with the governing body of the municipality in which the industrial establishment or real property is located and the local board of health. The report shall include: the types and quantity of hazardous substances involved in the hazardous discharge, if known; the location of the hazardous discharge; and any actions taken by the owner or operator of the industrial establishment to contain the hazardous substance.

b. A person who fails to make a report required pursuant to this section, knowingly gives or causes to be given any false information in any such report, or otherwise violates the provisions of this section, or any rule or regulation adopted pursuant thereto, is liable to a penalty of not more than \$50,000.00, to be collected in a summary proceeding under "the penalty enforcement law," N.J.S. 2A:58-1 *et. seq.*, or in a court of competent jurisdiction wherein injunctive relief has been requested. The Superior Court shall have jurisdiction to enforce "the penalty enforcement law." If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense.

The actual application of ECRA, however, makes the answer less clear. Under ECRA, the New Jersey Department of Environmental Protection (NJDEP) has authority to implement cleanups.¹² NJDEP reads ECRA's provisions to apply solely on the basis of ownership, regardless of the present owner's contribution to the condition of the hazardous waste site.¹³ Such a literal interpretation conflicts with the pre-ECRA holding in *Exxon*¹⁴ and imposes an oppressive burden on innocent purchasers.¹⁵ A more equitable solution would be to interpret ECRA so that NJDEP does not impose liability solely on the basis of ownership. If courts follow the *Exxon* holding,¹⁶ successor land-

c. If any person violates any of the provisions of this section, the Department of Environmental Protection, the governing body of the municipality or the local health department may institute a civil action in the Superior Court for injunctive relief to prohibit and prevent the continuation of the violation and the court may proceed in a summary manner.

d. Any person reporting a hazardous discharge pursuant to the provisions of this section shall not, by this report, incur liability for the cleanup of the hazardous discharge. The provisions of this subsection shall not affect a person's liability for the cleanup of a hazardous discharge under any other law, rule, or regulation.

N.J. STAT. ANN. § 13:1K-16 (West Supp. 1987).

12. N.J. STAT. ANN. §§ 13:1K-10, 13:1K-18 (West Supp. 1988) (promulgation of rules and regulations by NJDEP). See generally *New Jersey Said To Be On "Cutting Edge" In Requiring Waste Cleanup Before Land Sales*, 1 Toxics L. Rep. (BNA), Aug. 20, 1986, at 297 (discussion of NJDEP's administration of ECRA).

13. See, e.g., N.J. STAT. ANN. § 13:1K-7 (West Supp. 1988) (the transfer of real property); *id.* at § 13:1K-8(f) (any place . . . engaged in . . . hazardous substances . . . on-site); *id.* at § 13:1K-8(g) (on the site); *id.* at § 13:1K-11(c) (site cleanup).

There are other bare references to property or owner, without qualification as to responsibility. The legislative history of ECRA refers to the sale of "certain properties associated with hazardous waste," and refers to "owners" of "property which was once the site of an industrial establishment." SENATE ENERGY AND ENVIRONMENT COMMITTEE STATEMENT, ASSEMBLY NO. 1231 - L.1983 c. 330, reprinted in N.J. STAT. ANN. § 13:1K-6 (West Supp. 1987). Such references are conducive to misinterpretation of ECRA. See *infra* notes 18-25 and accompanying text.

14. See *supra* notes 8-10 and accompanying text.

15. See *supra* note 3 and accompanying text.

16. See *supra* notes 8-10 and accompanying text.

Under N.J. ADMIN. CODE tit. 7, § 26B-7 (1987) the NJDEP may issue an Administrative Consent Order (ACO) which will allow a transferor to transfer property prior to submission of a negative declaration or cleanup plan. N.J. ADMIN. CODE tit. 7, § 26B-7 (1987) lists nine possible criteria under which a landowner may qualify for an ACO, including the possibility of impending bankruptcy if NJDEP does not issue an ACO.

This article takes the position that there should be one more situation in which the NJDEP allows transfers under an ACO or similar dispensation: where the original contaminator is insolvent and the innocent current landowner is burdened with all cleanup costs. See *infra* note 18.

owners would not be liable for cleaning up hazardous waste for which they are not responsible.

The NJDEP interprets ECRA to overrule the *Exxon* holding.¹⁷ In its commendable task of forcing cleanup, the NJDEP overzealously attempts to apply ECRA solely on the basis of ownership. According to NJDEP, hypothetical landowner B should have to pay for cleanup before it can transfer to C. B then has a separate cause of action against A for reimbursement.¹⁸ The result is that innocent purchaser B

17. 16 N.J. Reg. No. 25, at 526. NJDEP stated its position as follows:

Several commenters expressed concern that actions of past owners or neighbors could cause the environmental problems resulting in ECRA cleanup under the Regulations. NJDEP intends to utilize the Regulation as a site specific environmental problem tool. Subsequent legal actions may be necessary by the owner or operator of an industrial establishment to determine and distribute responsibility among other parties.

Id.

See also Note, *An Innovative Approach*, *supra* note 2, at 191 ("Current owners are held liable by the Act but can pursue private legal actions against the transferor or generator of the waste.").

18. 16 N.J. Reg. No. 25, at 526.

The New Jersey Superior Court recently accepted this interpretation of the statute in *Superior Air Prods. Co. v. NL Indus., Inc.*, 216 N.J. Super. 46, 522 A.2d 1025 (App. Div. 1987). The NJDEP required Superior Air Products to clean up a site under ECRA provisions. Superior did not comply, and instead sued the former owner, NL Industries, to force NL Industries to conduct the cleanup. The court held that Superior could neither sue NL Industries directly to force cleanup nor require the NJDEP to sue NL Industries. *Id.* at 64, 522 A.2d at 1035.

The court agreed with NJDEP's view of ECRA. The property owner must conduct its own cleanup before transfer. The property owner may then file a separate action against former owners to resolve responsibility for the hazardous waste. *Id.* at 64, 522 A.2d at 1035.

The court decided that actual responsibility for the contamination does not affect liability for cleanups ordered by NJDEP under the auspices of ECRA; otherwise, cleanup would be delayed while former and present owners litigated the question of liability for cleanup. *Id.* The court stated that New Jersey enacted ECRA to avoid problems such as the situation in *State Dep't of Env'tl. Protection v. Ventron*, 94 N.J. 473, 463 A.2d 893 (1983) where cleanup was delayed for seven years while private parties litigated the issue of liability for cleanup. 216 N.J. Super. at 62, 522 A.2d at 1034.

The court recognized that "as a result of the ECRA proceedings . . . plaintiff may be required to expend substantial sums of money." *Id.* at 65, 522 A.2d at 1036. The court apparently believed that Superior Air Products would be reimbursed due to its suit against NL Industries. The court's rationale thus did not cover a similar fact situation in which the prior owner, unlike NL Industries, would be insolvent. In such a case, the court's rationale would place all the unreimbursed cleanup costs on an innocent party. In such a situation, it would be more equitable for NJDEP to allow the transfer of property to take place without enforcement of ECRA. NJDEP would then disburse public funds for the cleanup.

See N.J. STAT. ANN. § 13:1K-11(c) (West Supp. 1988) (no provision of ECRA is to

is subjected to two lawsuits.¹⁹

Until the NJDEP adopts a more equitable legislative interpretation, some innocent purchasers will be held liable under ECRA. New investors will avoid the New Jersey market if they face potential liability for the cleanup of waste which they did not produce. As applied by the NJDEP, the statute could be an unconstitutionally²⁰ oppressive imposition of liability in excess of the state police power.²¹

In the original hypothetical, B purchases property before the enactment of ECRA. Successor liability problems persist, however, after ECRA's enactment. For example, suppose landowner A sells to B, and B produces toxic waste on the property. Due to unforeseen business troubles, B cannot make payments on the property, and mortgagee C takes ownership. Is C liable for cleanup? The NJDEP would argue that C is directly liable on the basis of ownership. Mortgagee C would then have a separate cause of action against B to recover the amount of its liability.²²

Alternatively, suppose landowner A falsifies information to obtain a negative declaration that the site is waste free.²³ A then sells the property to B. If B wishes to sell to C, must B first pay all costs of cleanup

be "construed to limit, restrict, or prohibit the department from directing site cleanup under any other statute, rule or regulation").

19. The NJDEP will file action against the successor who will then have to file against the predecessor or be left with the entire burden of cleanup. *Id.* See *supra* note 3.

20. See *supra* note 3.

21. See *supra* note 3 and accompanying text. In the hypothetical, B would pay cleanup costs, but B could not collect these cleanup costs from A. The state has "taken" cleanup costs from B to pay for removal of A's waste. The state, therefore, should bear this responsibility.

Federal law concerning toxic waste cleanup avoids this constitutional infirmity. See 42 U.S.C. § 6934(b) (1983) (liability may be imposed on previous owners and operators).

Some states provide a similar defense in their Superfund statutes. See MINN. STAT. ANN. § 115B.03(1)(c) (1987); WISC. STAT. ANN. § 144.442(9)(b)(2) (1987); KY. REV. STAT. § 224.857 (1982). See generally Dean, *How State Hazardous Waste Statutes Influence Real Estate Transactions*, 2 Toxics L. Rep. (BNA), Aug. 19, 1987, at 352.

22. See *supra* notes 18-19 and accompanying text. NJDEP will also impose liability on innocent purchasers in the context of hostile takeovers. N.J. ADMIN. CODE tit. 7, § 7:26B-1.7 (1987) There is no abuse of the police power in this context, however, because the purchaser willingly accepts all assets and debts of the target. Such is not the case with the ordinary innocent purchaser of contaminated property.

23. See *supra* note 6 for definition of negative declaration. In the past, the NJDEP had not required an on-site inspection to ensure the integrity of each negative declaration. See N.J. ADMIN. CODE tit. 7, § 7:1-3.8(a), 7:1-3.11(c) (1987). Newer regula-

and then sue A separately? The NJDEP would say yes.²⁴ In all three hypotheticals, innocent transferees must sue contaminators to enforce ECRA. Furthermore, it is possible that A will be out of business or insolvent before the successor can discover the waste and recover against A.

Thus, the burden of cleanup will in some instances fall upon innocent transferees who will never gain reimbursement. Even if the successor does recover from the transferor, he must finance the cleanup costs and pay unexpected legal fees.²⁵ Arguably, the NJDEP should bear these costs. As a result, the NJDEP policy of liability based solely on ownership occasionally shifts the costs of enforcing ECRA from the public to the private sector.²⁶

ECRA provisions, however, indicate that the legislature did not intend to impose successor liability on innocent transferees. The use of the term "owner or operator"²⁷ consistently refers to the owner or operator of an "industrial establishment."²⁸ ECRA defines "industrial

tions will require a NJDEP inspection before the NJDEP approves any negative declaration. See N.J. ADMIN. CODE tit. 7, § 7:26B-5.1 (1987).

24. A literal reading of ECRA would also cause problems in condemnation situations. After property is condemned or foreclosed, the state could require the owner to pay for cleanup under ECRA. Combining such an additional burden with the taking raises due process questions. Clearly, there are problems with literally interpreting ECRA in every case. See generally Note, *New Accountability*, *supra* note 1, at 347. See also Hogan, *ECRA: An Update*, 114 N.J.L.J. 529, 544 (1984) (NJDEP has taken an inconsistent approach to condemnation cases).

25. See *supra* notes 18-24 and accompanying text. In *State Dep't of Env'tl. Protection v. Ventron*, 94 N.J. 473, 463 A.2d 893 (1983) all the litigants were ordered to pay the costs of their own legal fees. This ruling included the innocent purchasers. *Id.* at 504, 463 A.2d at 909.

Landowners are not allowed to reduce the property tax assessment by the amount of the cost of cleanup. In *Mar Associates, Inc. v. Carlstadt*, 214 N.J. Super. 256, 518 A.2d 1110 (App. Div. 1986).

26. *New Jersey ECRA Law Is Flawed, Should Not Be Used As Model*, *Attorney Says*, 1 Toxics L. Rep. (BNA), Nov. 12, 1986, at 654. (ECRA is responsible for cleanup by private owners at a minimal cost to the state).

27. The term "owner or operator" is not defined in the Act. The NJDEP recently attempted to clarify this ambiguity. N.J. ADMIN. CODE tit. 7, § 7:26B-1.3 (1987) defines "owner" as "any person who owns the real property of an industrial establishment or who owns the industrial establishment." *Id.* This definition reflects NJDEP's interpretation of ECRA. The definition of "owner" should include an exception for innocent transferees.

28. The terms are used in conjunction in §§ 13:1K-9, 13:1K-16. In N.J. ADMIN. CODE tit. 7, §§ 7:1-3.11, 7:1-3.12 (1987), NJDEP uses the two phrases interchangeably. Reference is made to correspondence between the NJDEP and the industrial establishment, rather than the "owner or operator" of the industrial establishment.

establishment" so that only those responsible for the presence of the toxic waste are liable for costs of cleanup.²⁹

Another indication of legislative intent is the inclusion of section 13:1K-16, which allows transferees to avoid liability if they report newly discovered hazardous waste.³⁰ The overall purpose of the new statute is to impose liability on the parties responsible for the presence of waste, thus negating all successor liability.³¹ This purpose suggests that NJDEP's interpretation of ECRA is incorrect.³²

The NJDEP's position is incorrect because: (1) it inequitably imposes cleanup costs on innocent successor landowners; (2) it deters investors from locating in the jurisdiction; (3) it ignores the legislature's intent to avoid successor liability; and (4) it allows for a potentially unconstitutional abuse of the police power by imposing successor liability on innocent transferees.

A better rule would conform to the *Exxon* holding by prohibiting the imposition of liability upon innocent transferees.³³ Acceptance of this rule would fulfill the main purpose of ECRA by avoiding the issue

29. "Industrial establishment" is defined in § 13:1K-8(f) and § 13:1K-15(c). An industrial establishment must be "engaged in" the "generation, manufacture, refining, transportation, treatment, storage, handling, or disposal of hazardous substances" *Id.*

That the party must be "engaged in" the listed activities shows that liability is to be imposed on the contaminators, not innocent purchasers. The term "engaged in" implies knowing action and can only be defined in terms of affirmative acts. If a party has taken no action to contribute to the waste's presence, then the party should not be liable.

See Note, *An Innovative Approach*, *supra* note 2, at 191. (ECRA appears to be activity-specific, not site-specific). For further support of this argument, see N.J. STAT. ANN. § 13:1K-13 (West Supp. 1988) (failure of transferor to comply with ECRA allows transferee to void transfer and hold transferor liable for all cleanup costs).

30. The exemption provision in § 13:1K-16(d) is directly contrary to the site-specific position taken in NJDEP administration of ECRA regulations, and also seems to contradict the court's opinion in *Superior Air Prods. Co. v. NL Indus., Inc.*, 216 N.J. Super. 46, 63, 522 A.2d 1025, 1035 (App. Div. 1987) (ECRA imposes strict liability before every transfer). See *supra* notes 18-19.

31. See *supra* note 1.

32. In support of its position, NJDEP would advance a literal reading of ECRA's provisions and the social policy goal of guaranteed decontamination before future transfers. These are admirable arguments that support enforcement of a commendable environmental statute such as ECRA. They do not withstand close analysis, however, in those situations where NJDEP enforces ECRA against an innocent transferee who will have no recourse against an insolvent transferor. In those instances, the NJDEP should pay for cleanup using public funds.

33. See *supra* notes 8-10 and accompanying text.

of successor liability altogether, either through predecessor cleanup³⁴ or through section 13:1K-16 release.³⁵

If it is effectively enforced, ECRA will usually resolve the issues of cleanup and successor liability. Courts would apply the *Exxon* doctrine only if both an innocent transferee and an insolvent transferor are involved.³⁶ In these infrequent cases, the court will impose cleanup costs either on the state or on the transferee. The equitable solution is to require the state to fund the cleanup, rather than to force a large, unexpected expense on the innocent transferee.³⁷ Society as a whole will benefit from cleanup. In addition, the state can absorb the loss more easily than an individual business person. The NJDEP's adoption of this position will not undermine its ability to administer ECRA effectively.

*Horton J. Lance**

34. See *supra* note 1. If land purchasers utilize ECRA and if the NJDEP accurately interprets ECRA, land purchasers can actually benefit by limiting their future liability through strict compliance with ECRA. See *Businesses Urged To Increase Efforts To Analyze Impact of Laws, Regulations*, 2 Toxics L. Rep. (BNA), June 10, 1987, at 57.

35. See *supra* note 11.

36. See *supra* notes 8-10 and accompanying text. If the transferee is not "innocent," the transferee is liable under ECRA for contributing to the waste or willingly taking the land with knowledge of the waste's presence. See *United States v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) (purchaser held liable after buying site of toxic landfill). If the transferor is not "insolvent," NJDEP should pursue the transferor or its successor in interest. Only if an innocent transferee purchases from an insolvent transferor will the state bear the burden of cleanup cost under the correct interpretation of ECRA.

37. The state can more easily accept the burden of the cleanup cost. Funds can be raised through measures not available to private parties, such as levies on hazardous waste industries, corporate surtaxes, and sale of state bonds. For an example see *\$1.65 Billion Waste Cleanup Plan Reflected In New Jersey Legislation Awaiting Signature*, 1 Toxics L. Rep. (BNA), Nov. 5, 1986, at 619. (New Jersey funds for cleanup raised through federal, state and corporate sources).

* J.D. 1988, Washington University.